

DECISION



11962 PL-1 Mr. Phil
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-194647

DATE: November 7, 1979

MATTER OF: E. Lehnert & Sons, Inc. DLG 03300

DIGEST:

1. Invitation contained brand name or equal clause. Since bidder offered equal product with descriptive literature which indicated product was not equal to brand name product, bid was properly rejected as nonresponsive.
2. There is no evidence of record indicating bias or prejudice by procurement activity personnel, since rejection of protester's bid was result of bid not meeting salient characteristics of IFB.
3. While FPR § 1-2.408(a)(1) requires that bidder be promptly notified of rejection of its bid, nothing in regulations requires that bidder be notified of unacceptability of bid prior to award.

E. Lehnert & Sons, Inc. (Lehnert), has protested the award of a contract to another firm under invitation for bids (IFB) No. DOT OST/79-011, issued by the Department of Transportation (DOT).

Protest Alleging — It is Lehnert's contention that the award was the result of bias and prejudice on the part of the procuring activity since a specific brand was chosen even though a known equal brand was available at a lower cost. Lehnert also contends that its protest to the procuring activity was totally ignored and that the evaluation of the bids should have been based on federally accepted standards, but was not in the present case. Lehnert also complains of not being notified prior to award that its bid was determined to be nonresponsive.

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For reasons, which will be explained later, we must conclude that Lehnert's protest is without merit.

The above invitation, issued on January 28, 1979, as amended, solicited bids for four (4) Scott Model 722, or equal, bus air-conditioning units and required the submission of descriptive literature to support an "or equal" bid. The bids were opened on March 6, 1979, at which time it was determined that Lehnert had submitted the low bid. Lehnert proposed to furnish a Therm-Air Manufacturing Co., Inc., air-conditioning unit, Weathertrol model BAC 4AG. A review of the technical data furnished by Lehnert with its bid indicated that its unit did not conform to certain salient characteristics of the brand name unit. Lehnert's unit only had a cooling capacity of 58,400 BTU's, whereas the brand name unit had a cooling capacity of 72,000 BTU's. Also, the condenser fan rating of the Lehnert unit was only 3,600 cubic feet of air per minute (CFM), whereas the brand name unit had a condenser fan rating of 4,200 CFM. On the basis of these deficiencies, Lehnert's bid was determined to be nonresponsive.

Lehnert argues that the cooling capacity of its unit was the same as that of the brand name unit, explaining that the 72,000-BTU cooling capacity for the brand name unit was "gross" capacity and that the "net" capacity for the brand name unit was the same as that of Lehnert's unit. Lehnert further states that the "condenser fan rating does not enter into this as Therm-Air moves the cooling air across a much larger condenser coil."

Paragraph (c)(1) of General Provision 39 of the IFB, the brand name or equal clause, states, in part, that:

"The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government

and will be based on information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating any information which is not identified in the bid and reasonably available to the purchasing activity * * *

According to the contracting officer, the information furnished by the protester with its bid did not reflect that its unit was equal to the brand name unit; in fact, the information furnished indicated otherwise.

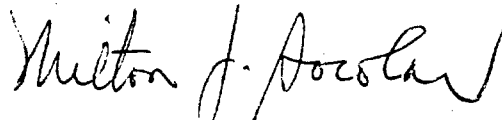
On the basis of the present record, we must conclude that the procuring activity's rejection of Lehnert's bid was proper since the data submitted with the bid showed that the unit offered by Lehnert did not conform to two salient characteristics of the brand name unit. See Ohio Medical Products, B-192317, October 23, 1978, 78-2 CPD 295; 49 Comp. Gen. 195 (1969).

Concerning Lehnert's contention that the award was the result of bias and prejudice on the part of the procuring activity, there is no evidence of record to support this contention. As explained above, the rejection of Lehnert's bid was proper under applicable rules and regulations.

Regarding Lehnert's contention that its protest to the procuring activity after award was totally ignored, there is evidence that Lehnert had at least one telephone conversation with the procuring activity and protested by mailgram and letter. The contracting officer states that he called both the Scott Air and Therm-Air Corporations, to verify the cooling capacity of the two units and the information that he received verified the published figures for the two units. Lehnert's protest was denied by letter dated April 20, 1979.

Regarding Lehnert's complaint that it was not advised prior to award that its bid was nonresponsive, the procuring activity was required by section 1-2.408(a)(1) of the Federal Procurement Regulations (1964 ed. amend. 68) to promptly notify Lehnert that its bid had been rejected and to state the reason or reasons why the bid was rejected. The procuring activity complied with this requirement when, on March 29, 1979, it mailed a letter to the protester advising that its bid had been rejected. This letter was received by Lehnert on April 3, 1979. Award was made on April 2, 1979. However, there is no requirement in the regulations that the notice of rejection be given prior to award. See SEG Electric Corporation and Boonton Electronics Corporation, B-179767, May 16, 1974, 74-1 CPD 258; Collins Machinery Corporation, B-181771, March 26, 1975, 75-1 CPD 178.

For the above reasons, the protest by Lehnert is denied.



For The Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

11962

B-194647

November 7, 1979

The Honorable Clarence D. Long
House of Representatives

Dear Mr. Long:

We refer to your letter of April 23, 1979, concerning a protest by Mr. C. Richard Lehnert, Sr., against the award of a contract to another firm under Department of Transportation solicitation DOT OST/79-011.

Enclosed is a copy of our decision of today denying the protest by Mr. Lehnert.

Sincerely yours,

For The Comptroller General
of the United States

Enclosure

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